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No. 84-1097

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

S. SIMCHA GOLDMAN,
Petitioner,

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF OF THE AMERICAN JEWISH COMMITTEE AND CHRISTIAN LEGAL SOCIETY AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the government may compel a military psychologist to violate his deeply held religious convictions by prohibiting his wearing an unobtrusive yarmulke.

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INTEREST OF THE AMICI CURIAE

The American Jewish Committee ("AJC"), a national organization of approximately 50,000 members, was founded in 1906 to protect the civil and religious rights of Jews. It is the AJC's conviction that the civil and religious rights of Jews will be secure only when the civil and religious rights of Americans of all faiths are equally secure. To fulfill this aspiration, the American Jewish Committee strongly supports the First Amendment principle of separation of religion and government, which is encapsulated in both the Establishment Clause and the Free Exercise Clause. One corollary of this principle is that only when justified by the com-

pelling interests of society may the state prevent an individual from carrying out a practice dictated by his religious beliefs.

The Christian Legal Society is a non-profit professional association of 3,500 Christian judges, attorneys, law professors, and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect and promote the freedom of both Christians and other persons in the exercise of their religious beliefs. The Christian Legal Society believes that accommodation by the state of the individual citizen's religious beliefs, as required by the First Amendment, strengthens the individual citizen's respect for, and allegiance to, our constitutional government.

SUMMARY OF ARGUMENT

Captain Goldman is a clinical psychologist in a military hospital, whose service record has been excellent. For many years, he has worn an unobtrusive yarmulke while working, in accordance with his deeply held religious convictions as an Orthodox Jew. After several years of meritorious service, he was ordered to remove his yarmulke while working, an order directly contrary to his traditional and sincerely held religious beliefs.

The First Amendment requires the state to accommodate an individual citizen's sincerely held religious beliefs, unless a compelling state interest exists, unachievable by less restrictive means. On the facts of this case, in which the wearing of a yarmulke was unchallenged for several years, the military's interest in enforcement of its regulations, merely for the sake of enforcement, does not constitute a state interest of the necessary magnitude to justify abridgment of a serviceman's free exercise rights. Under the First Amendment, Captain Goldman may serve both his religion and his country.

ARGUMENT

I. THE CONSTITUTION REQUIRES THAT STATE REGULATORY ACTIVITY ACCOMMODATE THE FREE EXERCISE OF RELIGION, EXCEPT WHERE TO DO SO WOULD BE INCOMPATIBLE WITH SOCIETY'S COMPELLING INTERESTS.

Normally, when government acts within the limits of its powers, it is entitled to expect that its laws will prevail over individual beliefs. The "concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-16 (1972). Even religious belief cannot "permit every citizen to become a law unto himself." *Reynolds* v. *United States*, 98 U.S. 145, 167 (1878). However, where an impediment to individual religious activity is traceable to state action, the Court has recognized that the Free Exercise Clause often compels the government to remove or mitigate such state-imposed impediments. Because of the high value that the Framers placed on religious liberties, this Court's cases have emphasized that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U.S. at 215 (1972).

Thus, the principle of "accommodation" has been properly invoked by the Court to resolve the conflict between a state-created program of regulations and an individual's religious beliefs. Indeed, it is the very fact of that state-created conflict which the Court has relied upon to rebut the argument that "an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause." *Wisconsin* v. *Yoder*, 406 U.S. at 220-21.

Such accommodation is not contrary to this Court's recent reaffirmation in *Wallace* v. *Jaffree*, 105 S.Ct. 2479,

2492 (1985), of "the established principle that the Government must pursue a course of complete neutrality toward religion." As one noted commentator has stated, neutrality as understood by the Court is *not* a " 'strict neutrality' theory, which would hold that 'government cannot utilize religion as a standard for action or inaction because [the two religion clauses] prohibit classification in terms of religion either to confer a benefit or impose a burden.' " L. Tribe, *American Constitutional Law* 821 (1978), *quoting* P. Kurland, *Religion and the Law* 18 (1962). So to understand the Religion Clauses would ignore an existential reality: a seemingly neutral statute may, under certain circumstances, have an unnecessarily greater negative impact upon a religious than upon a nonreligious person because of the former's religious obligations. Rather, this Court has affirmed:

> The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.

School District of Abington Township v. *Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., joined by Harlan, J., concurring). This notion of neutrality—which requires, as an essential element, that state action "work deterrence of no religious belief"—clearly contemplates that there may be times when, in order to ensure that state action is neutral with respect to *effect*, a religion-conscious accommodation will be permissible (see *Zorach* v. *Clauson*, 343 U.S. 306 (1952)) or, at times, compelled. See *Sherbert* v. *Verner*, 374 U.S. 398 (1963).[1]

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[1] The principle of accommodation is consistent with this Court's recent holding in *Thornton* v. *Caldor*, 105 S.Ct. 2914 (1985), which struck down, as a violation of the Establishment Clause, Connecticut's statute which provided Sabbath observers with an absolute and unqualified right not to work on their chosen Sabbath. That so-called "accommodation" involved no *state action* which deterred religious practice. Because it attempted "to lift a burden

This Court's cases have outlined the areas in which a state's interest is not deemed sufficiently compelling to override a claim to free exercise of religion, so that accommodation of religious practice is required. The state may not engage in regulative activity which has the effect of compelling or prohibiting, regulating, or taxing the expression of religious beliefs, where a more narrowly drawn regulation would suffice to serve the state's compelling interests. See *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961). Neither may a state enact a qualification for public service which, without sufficient connection to a legitimate government objective, deters an individual from engaging in activities compelled, or powerfully induced, by his religious beliefs. *See, e.g., McDaniel* v. *Paty*, 435 U.S. 618 (1978). Such actions with respect to religion clearly lie outside the government's ambit of authority. Similarly, where a government-mandated system of compulsory education poses obstacles to deeply held religious beliefs, believers are guaranteed an opportunity to send their children to privately financed religious schools or, in certain situations, to refrain from schooling altogether. *See generally, Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), and *Wisconsin* v. *Yoder*, *supra*. A public system of unemployment compensation that provides no benefits to persons who voluntarily refrain from work may not deny coverage to an employee whose resignation was precipitated by a conflict between work requirements and sincere religious convictions. *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Sherbert* v. *Verner*, *supra*.

Thus, this Court has limited governmental regulation of overt acts prompted by religious principles to cases

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on religious practice . . . imposed by *private* employers" it was "not the sort of accommodation statute specifically contemplated by the Free Exercise Clause." *Id.* at 2919 (O'Connor, J., concurring). See *Wallace* v. *Jaffree*, 105 S.Ct. at 2497 (O'Connor, J., concurring).

where the regulated conduct poses "some substantial threat to public safety, peace or order." *Sherbert* v. *Verner*, 374 U.S. at 403 (1963). The cases in which this Court has upheld the claim of governmental authority against a free exercise challenge uniformly fit within these narrow categories.[2] Thus, the interest of the state is not only valid but compelling in matters of health and child welfare, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (child labor laws enforceable so as to prevent children's sale of religious literature), or where the duty from which an individual seeks exemption is one of the essential responsibilities of citizenship in our modern society, necessary to preserve peace or the orderly operation of society. See *Gillette* v. *United States*, 401 U.S. 437, 461-462 (1971) (no free exercise right to avoid military service based upon religiously-based conscientious objection to a particular war);[3] *United States* v. *Lee*, 455 U.S. 252 (1982) (no free exercise right to avoid paying taxes).[4]

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[2] An additional category of "morals" is sometimes added. Obviously, this is not taken to mean that government may decide which religions are "moral" or "immoral". Rather, this category is not altogether distinct from threats to "public order", in that restrictions are justifiable only when the conduct in question assaults one of the most fundamental bedrock values of our society or legal order, such as the principle of nondiscrimination embodied in the Fourteenth Amendment or the prohibition of polygamy. *Bob Jones University* v. *United States*, 460 U.S. 574 (1983); *Reynolds* v. *United States*, 98 U.S. 145 (1878).

[3] While there may not be a First Amendment right to avoid military service on religious grounds, this Court has clearly established that the allowance of such accommodation of religious belief (broadly defined) is within Congress' prerogative. *Welsh* v. *United States*, 398 U.S. 333 (1970); *United States* v. *Seeger*, 380 U.S. 163 (1965).

[4] The decision in *Lee* was predicated on the realistic assessment that the social security system is not an individual "insurance" system (from which a religious group providing its own system of social and personal insurance might legitimately claim exemp-

By way of contrast, this Court has found even compelling state interests insufficient to override a claim to exemption from state programs, based upon religious belief, where granting the religious claim would cause no harm to others and would involve only *de minimis* alterations of a governmental legislative or regulatory scheme. *See, e.g., Wisconsin* v. *Yoder, supra* (state compulsory education laws); *Thomas* v. *Review Board, supra* (state unemployment benefits system); *Sherbert* v. *Verner, supra* (same).

II. THE MILITARY IS REQUIRED BY THE FREE EXERCISE CLAUSE TO MAKE THE NARROW AND MINOR REGULATORY EXCEPTION SOUGHT BY PETITIONER.

Were it not for the military setting in which this case arises, there would be no question whatever, based upon the principles enunciated above, that the precedents of this Court would compel judgment for Captain Goldman. The case at bar involves a claim to a minor exception from governmental rules imposed for the sake of uniformity and administrative convenience. The legitimacy and sincerity of the claimant's religious belief is unchallenged. Captain Goldman asks for no special benefits of a substantive nature; nor does he ask for exemption from fundamental duties incident to citizenship in the nation, such as payment of taxes, or availability for military service; nor does the exception sought interfere with any government rule designed to insure safety, peace, health or public order. All Captain Goldman asks is that civil government "accommodate[] the public service to [his] spiritual needs." *Zorach* v. *Clauson*, 343 U.S. at 314 (1952). Notwithstanding the military setting, a fair application of

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tion), but a system of general taxation and transfer payments and, as such, indistinguishable from the obligation to pay taxes generally. 455 U.S. at 258 ("mandatory participation is indispensable to the fiscal vitality of the social security system"). See U.S. Const. Amend. XVI.

the Free Exercise Clause requires that Captain Goldman be granted the narrow, limited exception which he seeks from the dress regulations promulgated by the United States Air Force.

This Court has consistently provided more that its usual "customary deference" to a coequal branch of government in determining the constitutionality of congressional judgments with respect to the national defense and military matters. See *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983); *Rostker* v. *Goldberg*, 453 U.S. 57, 64-66 (1981). Nevertheless, the Court explicitly has acknowledged that military matters are subject to constitutional limitations, stating:

> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as in any other, Congress remains subject to the limitations of the Due Process Clause, but the tests and limitations to be applied may differ because of the military context. We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice.

Rostker, 453 U.S. at 67 (citations omitted).

In according this deference, however, this Court explicitly declined the Government's invitation further to refine the applicable tests, where allegations of constitutional violations are directed at the military, so as to require only that challenged regulations bear a "rational relation to some legitimate Government purpose". *Id.* at 69. To the contrary, this Court explicitly noted that it had *not* previously applied "a different equal protection test because of the military context," *id.* at 71 (citing *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975)), and proceeded to determine whether the challenged "action transgressed an explicit guarantee of individual rights", even in light of the judicial deference to congressional mili-

tary expertise. *Id.* at 70. Whatever the appropriate standard for examination of a military determination subject to constitutional challenge (whether "strict scrutiny" or an intermediate standard), it is clear, under *Rostker*, that there is a judicial obligation to determine whether individual rights guaranteed by the Constitution—be they the right of free exercise or the right to equal protection —have unjustifiably been subject to encroachment.

The court below acknowledged its constitutional obligation, consonant with *Rostker*, to determine whether the Air Force's refusal to accommodate the requirements of its dress code to Captain Goldman's religiously compelled requirements to wear a yarmulke served "legitimate military ends . . . sought to be achieved by means designed to accommodate the individual right to an appropriate degree." 734 F.2d 1531, 1536. However, notwithstanding this acknowledgment, the Court of Appeals failed properly to balance "legitimate military ends" against "individual rights." Rather, the Court of Appeals abdicated even the limited role which the judiciary must play in the context of the military. This appears evident from the Court of Appeals' own enumeration and assessment of the Air Force's justifications for its refusal to accommodate Captain Goldman's religious practices.

Thus, the Court of Appeals rightly found "unpersuasive" the Air Force's argument that one reason for scrupulous uniformity with respect to its dress code is safety, finding that "more narrowly drawn regulations, accommodating religious practices to a greater degree, would satisfy such safety concerns". 734 F.2d at 1539. The court also noted the potential weakness of the argument that "if members of numerous other religions with distinctive garb flood the Air Force with requests for exemptions, . . . severe disruption would result", by observing that "[t]his argument assumes that substantial numbers of these sects have enlisted and would be likely to request exemptions. . . ." *Id.*

The Court of Appeals further found "weak" an Air Force argument that "it cannot reasonably distinguish [the relative obtrusiveness] among various religious practices, but must either allow or disallow all requested exceptions." *Id.* In a telling critique of this Air Force rationale, the Court of Appeals stated:

> [It] appears that the Air Force *already* distinguishes among practices that may be religious, for the regulations permit certain deviations from complete visible uniformity, such as the wearing of rings and bracelets of nonuniform design, see AFR 35-10 § 1-12(b)(1)(b), and have been interpreted to allow the wearing of nonuniform undergarments and ornaments, provided they are not visible beneath the required uniform, despite the existence of military-issue undergarments. The Air Force, therefore, does distinguish, for example, Mormons who wear "temple garments" underneath their outer clothing from Orthodox Jews, whose religious garb, though visible, is nearly as unobtrusive. If obtrusiveness is the underlying standard actually employed in making these distinctions, the Air Force arguably should be required to employ it in a more thoroughgoing manner, in order to accommodate rights of free exercise to the greatest possible extent.

Id. at 1540.

Having effectively rebutted the Air Force's assertion that the challenged regulations were necessarily connected to various purported regulatory purposes, the Court of Appeals nonetheless abruptly concluded that:

> [T]he peculiar nature of the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible. That interest lies in the enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement. Its regulations are necessarily arbitrary . . . . Unlike the states in *Wisconsin* v. *Yoder*, *Thomas* v. *Review Board*, and *Sherbert* v. *Verner*, whose interests in enforcing their rules would not be greatly impaired

> by making exceptions when enforcement would not serve the purpose underlying the rules, the Air Force has no concrete interest separate from the effect of strict enforcement itself.

Id. This finding was premised on the Air Force's assertion that flexibility as to Captain Goldman's religious claim would breed resentment among other servicemen and thereby adversely affect discipline.

Thus, the challenged regulations were, in essence, upheld by the Court of Appeals *solely* because the military's need for discipline requires uniform adherence to its rules, no matter how arbitrary and regardless of countervailing constitutional considerations. The rationale that uniform application of regulations is necessary for its own sake may be justifiable when fundamental constitutional rights are *not* directly and uncontrovertibly implicated. However, when a fundamental constitutional right is undeniably at stake, to uphold governmental regulations without further judicial inquiry is to create a standard of inquiry which places virtually any military action beyond review of the courts. Manifestly, any regulation, having otherwise failed of justification, can be justified as necessary not for its own sake, "but for the sake of enforcement." As Judge Starr, dissenting from the denial of the petition for a rehearing *en banc*, cogently stated:

> Not a scintilla of evidence in the record suggests that [Petitioner's] wearing of a yarmulke caused any resentment whatever in others. The claim is contradicted by expert testimony, credited by the trial court, that making exceptions to accommodate deeply held religious beliefs would defuse rather than cause resentment. The claim is also at odds with common sense. Reasonable servicemen would more justly be annoyed with the mechanical enforcement of arbitrary rules that prevent the wearing of such unobtrusive symbols of religious faith while allowing others to wear religious rings and bracelets.

739 F.2d 657, 659. It should be stressed in this regard that Captain Goldman wore his yarmulke on duty for many years, with no hint of "resentment" among his fellow servicemen. *Id.*

The Air Force's justification for enforcement of an admittedly arbitrary dress regulation, in the face of Captain Goldman's religiously-compelled obligation to wear a small skullcap which is neither obtrusive nor displaces military dress, runs counter to expert testimony and common sense. Moreover, it runs counter to the fundamental notion that the Free Exercise Clause requires "those in authority to accommodate those who wish to exercise their religious liberties, unless the accommodation would prove unduly burdensome." *Id.* Even the appropriately great deference that this Court must allow to the military with respect to determination of its own needs cannot allow the Air Force to sweep aside First Amendment guarantees, with no more than conclusory assertions, contradicted by the record and by common sense.

The imperative that the Court diligently pursue its obligation to determine whether the accommodation of religion sought by Captain Goldman "would prove unduly burdensome" is made even more compelling when one considers that the Air Force's mechanical enforcement of an arbitrary dress regulation prevented Captain Goldman's wearing of an unobtrusive symbol of religious faith even while allowing others to wear, for religious reasons, items of apparel which were not part of the standard uniform. The Court of Appeals itself acknowledged, in rebutting the claim that the prevention of "obtrusiveness" had been the Air Force's guiding principle, that:

> [It is] no answer to assert . . . that wearing rings and special undergarments are not exceptions to the uniform requirements, on the ground that the regulation specifically allows them, because the reason for the difference in treatment of various nonstand-

> ardized articles of clothing and ornaments, rather than the fact of the difference, would [then] be at issue.

734 F.2d at 1246. However, the Court of Appeals' ruling, premised on the military's assertion that the uniformity imposed by the dress regulation is necessary for the sake of enforcement, raises exactly that issue—the issue of why regulations were enacted allowing one variety of religious observance, while, at the same time, other regulations forbid a practice of another faith which is indistinguishable in terms of obtrusiveness or interference with duty. Not only free exercise concerns, but also weighty concerns of equal protection, are raised when the military may arbitrarily, and without objectively verifiable justifications, ordain that certain religiously-compelled dress requirements are forbidden and others are not.

In the absence of any evidence supporting the justifications espoused by the Air Force for its failure to accommodate Captain Goldman, accommodation is required. In the alternative, at the least, this matter should be remanded for further evidence with respect to those justifications.

CONCLUSION

Accordingly, *amici curiae* urge this Court to reverse the judgment of the court below.

Respectfully submitted,

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